From: Keith E. Risler
To: Microsoft ATR
Date: 1/25/02 1:07pm
Subject: Microsoft Settlement

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EMAIL TO: microsoft.atr@usdoj.gov
RE: Microsoft Settlement
FROM: KEITH E. RISLER
DATE: 25 January 2002

These comments are supplied as part of the public comment process required by the Tunney Act, and refer to the proposed settlement of the antitrust trial involving Microsoft Corporation.

As you are likely aware, Microsoft Corporation maintains a mailing list that it refers to as the "Freedom to Innovate Network." During the long period involving its antitrust trial, Microsoft Corporation has sent many "FINFlash" mailings (the term FINFlash being coined by Microsoft itself in such mailings) to persons on their "FINFlash" list.

Microsoft has recently been dispatching FINFlash mailings encouraging people on the FINFLash list to submit comments on the proposed settlement, as permitted by the Tunney Act. Microsoft noted in a FINFlash I received on December 31, 2001 that:

"The law (officially called the Tunney Act) requires a public comment period between now and January 28th after which the District Court will determine whether the settlement is in the 'public interest.' Unfortunately, a few special interests are attempting to use this review period to derail the settlement and prolong this litigation even in the midst of uncertain economic times. The last thing the American economy needs is more litigation that benefits only a few wealthy competitors and stifles innovation. Don't let these special interests defeat the public interest."

Although I do not agree with Microsoft's unsupported assertion that "special interests" seek to defeat the proposed settlement, I do wish to offer comment as allowed by the Tunney Act. I am not a particularly "special" interest, but for many years was supportive of Microsoft Corporation, purchasing thousands of dollars worth of fully licensed Microsoft software. I am one of Microsoft's most loyal, repeat customers.

I have been on Microsoft's FINFlash mailing list for some time; during the initial phases of the Microsoft antitrust trial, I was a supporter of Microsoft Corporation with respect to the allegations made by the U.S. Government against the company. During the trial and especially in light of the Findings of Fact in the case, my position changed.

I was compelled to conclude by the rational and logical way in which the Findings of Fact summarized many Microsoft practices that had seemed a mystery to me in previous years, that Microsoft has indeed engaged in illegal practices.

As I reviewed the Findings of Fact, it became logically and rationally evident that Microsoft for many years has not been so much in the business of selling products in demand by the public, so much as Microsoft has been aggressively funnelling the public to products it happens to market, or has plans to market.

I use Microsoft products that I have acquired both from my location in Canada, as well as direct from Microsoft in the United States. I am a licensed user of Microsoft Visual Basic version 6.0, and have used that product dating back to its early days as Microsoft QuickBASIC. I am a licensed user of two fully licensed copies Microsoft Office 2000 Premium Edition, one such package being acquired in the United States, in addition to other Microsoft products, the patches and upgrades for which have often been shipped from Microsoft in the United States.

As one who has used Microsoft products in one form or another for almost 18 years now, I can only conclude that the proposed Microsoft antitrust trial settlement is inadequate. My comments are as follows:

1. The proposed settlement fails to effectively prohibit in the future the same illegal or similar conduct that Microsoft Corporation committed in the past.

The oversight concept that has been rolled into this settlement will do no more than guarantee the same kind of corporate behavior that Microsoft engaged in with respect to the previous consent decree. That is to say that, in effect, no real restrictions have been placed on the company by the settlement, in terms of people who would supposedly supervise Microsoft in some ill-defined manner.

2.The proposed settlement does nothing to reign in Microsoft's ability to shape the market as it pleases.

My understanding of U.S. antitrust law is that the general presumption is that the potential harm to the consumer should be the guiding factor; that principle seems to be ignored in the proposed settlement or at best given short shrift.

I believe there is plenty of extant evidence to suggest that Microsoft, despite the antitrust trial proceedings, is even now exercising a degree of market manipulation that suggests it totally dominates most of its key markets. It is reasonable that the court consider how the proposed settlement affects such ability on Microsoft's part to effectively decide where both consumers and competitors go today, tomorrow, and long into future.

Case in Point: Microsoft Corporation some time ago announced its .NET (pronounced "Dot Net") initiative. Referred to as bringing "software as a service" to the market, when I for one haven't heard anyone I know express an interest in what amounts to forced rental of software, .NET very clearly implies Microsoft's capacity to shape the market at will to the detriment of consumers and competitors.

To be more specific, consider how Microsoft has behaved, and is behaving at this very moment, with respect to its very widely used Visual Basic software, previously in current version 6, and reissued with a pricey new twist in "upgraded" .NET form.

When Microsoft recently announced that the next versions of its programming languages were available, Visual Basic users found that they could no longer continue to upgrade to just Visual Basic! Instead, the Visual Basic user must acquire or "upgrade" to the full suite of Microsoft programming languages now reworked as Visual Studio .NET, just to upgrade Visual Basic. The standalone Visual Basic product has been abruptly eliminated.

Microsoft, as of this writing (January 25, 2002) maintains a web page with a Visual Studio .NET FAQ ("Frequently Asked Questions" page). It is located at:
http://msdn.microsoft.com/vstudio/prodinfo/qa.asp

One of the rhetorical questions on that FAQ page asks: "Where are the Professional and Enterprise versions of Microsoft Visual Basic(R) .NET and Microsoft Visual C++(R) .NET?"

The glib Microsoft answer on that FAQ page is that:

"The functionality previously available in Professional and Enterprise versions of the individual language products is now available in the Professional and Enterprise versions of Visual Studio .NET...."

Few companies that I know of have the ability to engage in such tied selling and make it work to their advantage without losing market share.

Although one is nominally free to continue using Visual Basic, one has to buy the new Visual C#.NET (pronounced "See Sharp Dot Net") .NET programming language as well, as it comes with Visual Studio .NET. One cannot see many

small developers bothering to continue with Visual Basic after being forced to buy much of Microsoft's .NET kitchen sink. Once this forced march investment is made one might as well cave in and rationalize the "investment."

This is the kind of nudging that I have seen Microsoft use over the years; it comes in many forms in my experience, the key indicator being that one tends to be forced marched where Microsoft wants to go today or whenever.

Very few companies have the capacity in the marketplace to take a product that stood alone and sold well as such, and then tie its continued currency to buying a full range of .NET specific programming languages as well. I submit that no company should have such power in the marketplace.

Aside from the compelled option of having to buy into much of .NET just to get Visual Basic's latest upgrade, there is the not-so-trivial issue of the major cost increase that is involved as well.

Moreover, this bundling move on the part of Microsoft will surely result in .NET applications evolving faster, artificially tending to entrench to a greater degree than otherwise the .NET application framework.

I also feel that one can see Microsoft's control of the marketplace in other respects that the settlement does not address.

Case in point: Once upon a time there existed a whole range of relatively inexpensive tape backup drives that operated off of the floppy cables within desktop personal computers (PCs). Windows 2000 eliminated support for such tape drives, obsoleting users of these devices overnight.

I had two such tape drives in service. One was an HP Colorado 350, the other an Iomega Ditto Max tape drive that was barely two years old. These drives could both operate off of separate controller cards in the PC but they both ended up being unsupported by Microsoft under Windows 2000.

In the early days of the PC it tended to be software alone that was obsoleted by version upgrades; now we are seeing a pattern of hardware devices being obsoleted rapidly as well.

I do not believe that it is entirely coincidental that the availability of tape drive support for reasonably priced tape drives in Windows has diminished just as Microsoft introduces optional web-based data storage options. Here is that nudge again.

What seems key here is that Microsoft controls the operating system, which no longer has support for such low-cost tape backup devices built in. The company should not have the power to position consumers to rent subscription (ultimately ".NET") storage space for data, by virtue of dropping out low-cost localized backup options, if indeed that is what the firm has been up to here.

After all, Microsoft has maintained support in its operating systems for other devices of similar vintage.

Consequently, I suggest that it is especially important for the court to carefully and studiously examine Microsoft's .NET initiative before issuing any final ruling.

Although Microsoft has claimed that the .NET standards broadly adoptable, the key .NET programming tools are clearly proprietary to Microsoft. If past patterns hold, Microsoft will emerge dominant on the Internet with .NET just as it dominated the desktop with Windows.

It has been said by others that .NET is essentially a Windows redo for the Internet; I believe that to be the case and that the court should examine .NET with great care in this context. Microsoft by all accounts is now sitting on mammoth cash reserves, a portion of which surely represent

ill-gotten gains from its antitrust practices.

Microsoft is therefore positioned to leverage its dominance of the emergent software-as-service market from a position of strength even greater than in the past.

In this respect as well, the proposed settlement's failure to require Microsoft to publish the source code of its operating systems (and the code for the .NET framework) looms as a glaring omission, as critics have long argued that Microsoft likely builds secret hooks into software code that favor its own products' operational efficacy.

Any final settlement should require the unconditional, unrestricted, fully public-accessible publishing and web-posting of Microsoft source code, at the very least for all of its operating systems and .NET, past and present.

3. Microsoft was found to have engaged in illegal antitrust practices. My understanding is that there exists a requirement that the party so convicted be deprived of the gains from such activity.

There is nothing in the proposed settlement that suggests any substantive penalty here.

I would suggest that a fair penalty must reflect the removal of some major part of the ill-gotten gains. Perhaps a fair compromise would be to ban Microsoft from proceeding with .NET for a period of some years, and from offering any product definable in any manner as a "web service," or as, "software-as-a-service" or anything broadly equivalent for an appropriate period of time as well. Care would have to be taken to prevent Microsoft from simply establishing separate firms, or partnering with other firms in this respect, during any period of prohibition.

To address the gains Microsoft made during past periods of antitrust behavior, some very heavy dollar penalty should also be imposed in my view, in order to reduce the ill-gotten cash reserve that Microsoft has available now to over-leverage future endeavors.

Such a financial penalty should be sufficient to reduce Microsoft's cash assets to levels similar to other software companies. This would effectively prevent Microsoft from leveraging its massive cash assets and effectively subsidizing its process whereby it funnels both consumers and developers to .NET.

Thank you for affording the public an opportunity to comment at this time.

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